

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2002B040

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANTHONY VELASQUEZ,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
ADAMS STATE COLLEGE,

Respondent.

This matter was heard by Administrative Law Judge Robert W. Thompson, Jr. on February 12, 2002. Respondent was represented by Joseph Q. Lynch, Assistant Attorney General. Complainant appeared in-person and was represented by Mark A. Schwane, Attorney at Law.

MATTER APPEALED

Complainant appeals his layoff. For the reasons set forth below, respondent's action is affirmed.

ISSUE

Whether respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

The Administrative Law Judge considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. Complainant, Anthony Velasquez, was hired by Adams State College (ASC), respondent, as Maintenance Mechanic's Helper on June 5, 1990. At the time of his 2001 layoff, he held the position of Structural Trades I. He worked on the renovation crew for the housing services department, which is self-supporting. As an auxiliary service, the housing department is funded by fees charged to students living in the dormitories. The housing department does not receive general state funds.
2. Complainant's salary was paid from the auxiliary services budget. Specifically, his position was funded by a 1993 bond, which was approved by a vote of students and faculty for renovation purposes.
3. The housing renovation project was originally scheduled to last for five years, but the anticipated time period became longer as the number of crew members was reduced to three. Complainant was one of the three.
4. On March 1, 2001, the bond money ran out. It had been known for some time that the renovation project was in danger of running out of funds before the project was completed. The status of the renovation crew was of significant concern. Money was taken from other sources to keep the renovation project going temporarily.

5. On October 9, 2001, the Director of Housing, Michael Jolly, submitted to the Budget and Planning Committee of ASC a request for \$200,000 in additional funds to continue the renovation project. The committee denied the request because the money would have had to be taken from the student scholarship fund. The committee concluded that remodeling of the dorms would be placed on hold and the crew released as of December 1.
6. The renovation crew was supervised by Facilities Services. On October 11, 2001, in response to the budget committee's decision, Erik van de Boogaard, the Director of Facilities Services, issued a memo to the facilities staff, of which complainant was one, notifying the staff that three positions would have to be discontinued. The memo informed the employees that the human resources director would develop a layoff matrix pursuant to state personnel rules and guidelines, and that the affected employees would be notified and counseled accordingly.
7. The layoff had been a matter of discussion for approximately one year. During that time, complainant and others visited the human resources office to inquire of their options and job security. Alternatives such as downgrading positions, promoting into a soon-to-be vacant position, and creating an internship were considered. None of these options proved feasible or helpful in retaining positions.
8. Jack Heidler, Director of Human Resources, processed the layoff, appropriately establishing a matrix for the ranking of employees within a time band for the past three years.
9. On October 31, 2001, complainant was given a 45-day written and verbal notice that his position of Structural Trades I would be abolished

effective December 14, 2001, due to the lack of funds, and that he would be laid off.

10. Complainant was further notified that there were no positions in the Structural Trades I classification to which he had retention rights, that there were no vacant positions in his current classification series, and that he did not have retention rights to encumber a lower level position because he had not been certified in any other classification.
11. Complainant had no retention rights. He had not been certified in any previous class.
12. One of the laid off employees bumped into a custodial position. Another resigned.
13. Complainant Velasquez filed a timely appeal of his layoff on November 8, 2001.

DISCUSSION

I.

In this appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by a preponderance of the evidence that the action of the agency was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991). See *Department of Institutions v. Kinchen*, 886 P. 2d 700 (Colo. 1994) (explaining role of state personnel system in employee discipline actions). The Board may reverse respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S. In determining whether the agency's decision was arbitrary or capricious, it must be determined whether a

reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999).

II.

Complainant questions the real need for his layoff, pondering how much money was actually saved. He argues that the college did not adequately explore alternatives to layoff, in violation of R-7-2, and alleges that the matrix should have included a larger number of employees. These contentions are without merit.

Complainant failed to show by preponderant evidence that there was funding available to retain his position, or that the human resources director failed to correctly establish the necessary matrix. He did not even suggest an improper motive for his layoff or put forth any reason for the layoff other than the one advanced by respondent, that is, a lack of funds.

Rule R-7-2, 4 CCR 801, encourages appointing authorities “to explore and, when appropriate in their discretion, implement innovative alternatives to minimize or avoid the need for layoffs of employees in the state personnel system.” This rule does not mandate that there be no layoffs of state classified employees. It does not guarantee an employee that the appointing authority will always be able to implement an innovative alternative to layoff. It does not convey a right upon the employee. Furthermore, in the instant case, the college looked into possible alternatives but came up empty-handed.

Affirmatively, respondent demonstrated by substantial evidence that it properly followed all the layoff rules and applied them correctly. See Rules R-7-8 through R-7-19, 4 CCR 801.

III.

Both parties withdrew their request for attorney fees and costs. See R-8-38.

CONCLUSIONS OF LAW

Respondent's layoff action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day
of March, 2002, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of March, 2002, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Mark A. Schwane, Esq.
Colorado Federation of Public Employees
1580 Logan Street, Suite 310
Denver, CO 80203

And by courier pick-up, to:

Joseph Q. Lynch
Assistant Attorney General
Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
